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IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 72-530

MORTIMER G. LEVINE,

Petitioner,

and

ROYAL E. BLAKEMAN, MARTIN M. GREENBERG and HENRY MITTLER,

Plaintiffs,

against

THE LONG ISLAND RAIL ROAD COMPANY and METROPOLITAN TRANSPORTATION AUTHORITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENTS IN OPPOSITION

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Opinions Below

Respondents are not dissatisified with the statement in the Petition for Certiorari.

Jurisdiction

Petitioner incorrectly states (Pet. 2)[1] that this Court's jurisdiction is based on 28 U.S.C. § 1254(1), which relates to review of decrees of the United States Courts of Appeals. The jurisdiction of this Court should properly have been invoked pursuant to 28 U.S.C. § 1257(3).

Question Presented for Review

May a state agency, pursuant to the rate-making power delegated to it by the state legislature, require that ten-trip tickets stating that they were good for one year and sold by its wholly-owned subsidiary railroad corporation subsequent to the delegation of the rate-making power, be redeemed at any time on a pro-rata basis, when such action is taken as part of a reasonable general fare increase, which, *inter alia*, provided that that form of ticket would be honored for passage during the ensuing 40 days and abolished thereafter; and when such action is necessary in view of the extreme financial crisis of the railroad and to prevent persons of means who purchased numbers of such tickets in anticipation of the general fare increase from continuing to avail themselves of the lower rate or from reaping speculative profits on the tickets at the expense of those not so fortunately situated economically?

Constitutional and Statutory Provisions Involved

Article I, United States Constitution, Section 10, Clause 1: "No state shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ."

New York Public Authorities Law, § 1266, subdivision 3, provides in pertinent part: "The Authority may establish

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[1] References to pages in the Record on Appeal are designated (R.) and to pages in the Petition (Pet.).

. . . such fares . . . as it may deem desirable for the use and operation of any transportation facility . . . operated . . . by a subsidiary corporation of the Authority. . . . Any such fares . . . shall be established . . . only after a public hearing. . . . Such fares . . . shall be established as may in the judgment of the Authority be necessary to maintain the combined operations of the Authority and its subsidiary corporations on a self-sustaining basis."

Statement of the Case

Respondents disagree with the statement of the case as presented in the Petition for Certiorari and in lieu thereof, set forth the following:

Under date of December 30, 1971, as a result of its past and projected large deficits, the Long Island Rail Road (hereinafter "LIRR") requested the Metropolitan Transportation Authority (hereinafter "MTA") to approve certain fare increases and changes in the rules and regulations of the LIRR governing the issuance and honoring of various classes of tickets. These changes constituted a complete revision of the whole concept of the fare structure of the LIRR and were designed to more equitably distribute the financial burden of operating the LIRR and to eliminate a number of abuses of tickets that had become prevalent under the old fare structure (R. 61; 64-71). As part of its request, the LIRR sought MTA approval for the elimination of ten-trip tickets (R. 65).

After the public hearing held on January 17, 1972, to consider the restructuring of the whole fare structure of the LIRR and after considering all of the relevant issues, the MTA, by resolution adopted January 20, 1972, to be effective January 21, 1972 (R. 72-95) established a date after which ten-trip tickets previously sold but not yet presented would no longer be honored for transportation. In this connection, it directed the LIRR to redeem, on a

pro-rata basis, any unpunched spaces turned in by ticket holders after the date established by the MTA for the non-honoring of the tickets for transportation (R. 90). In approving the discontinuance of the ten-trip tickets the MTA said:

> The fact is that the ten-trip ticket is difficult to administer, has been abused and is very costly to the railroad's revenues. (R. 97-98.)

Accordingly, the LIRR, immediately after the MTA announcement, commenced a practice of stamping all ten-trip tickets with a notation that the tickets were not valid after March 1, 1972, and published a fare schedule which, *inter alia,* included the following under the title of Schedule No. 14, REFUND POLICY:

> TEN-TRIP TICKETS
>
> Ten-trip tickets issued prior to the effective dates of these fare schedules will be honored only until midnight of the 1st day of March, 1972, after which, upon application, refunds will be made on the basis of the price of the ticket pro-rated to reflect the number of trips punched. (R. 62.)

Petitioner Levine, by his own admissions (R. 26-28), having learned of the proposed fare increase and cancellation of the ten-trip tickets, attempted to defeat the system by purchasing and hoarding in advance of the MTA's determination an undisclosed number of ten-trip tickets, which he intended to use subsequent to March 1, 1972.

The LIRR, in requesting this most recent fare increase and the cancellation of the ten-trip tickets, was faced with a projected deficit for 1972 of over $52,000,000, of which the requested fare increases and changes were expected to cover $10,400,000 (R. 64; 96-97). While recognizing that the elimination of the ten-trip tickets would work

some hardships, both LIRR and MTA were convinced that this step was necessary, not only to raise the badly needed revenues, but also to equitably distribute the burdens among all riders, since this class of tickets had been subject to considerable abuse and caused great difficulty in administration (R. 97-98).

On February 29, 1972, the Supreme Court, Nassau County, rendered a decision adverse to respondents and granted a permanent injunction restraining the LIRR from refusing to honor the unexpired and unused ten-trip tickets (Pet. 18a).

LIRR and MTA promptly commenced an appeal to the Appellate Division, Second Department, which on March 1, 1972, upon the application of various plaintiffs, including petitioner herein, vacated the automatic stay granted the LIRR, as a wholly-owned subsidiary of a state agency, by the New York Civil Practice Law and Rules, Section 5519(a)1. The Appellate Division, Second Department, heard oral argument on March 3, 1972, at which time briefs were filed by all parties, and that Court substantially modified the Judgment of the Supreme Court, Nassau County, and vacated that part of the Judgment requiring the LIRR to continue honoring ten-trip tickets presented for transportation (Pet. 19a). Petitioner appealed to the Court of Appeals of the State of New York, which heard oral argument on June 9, 1972, and on July 6, 1972, unanimously affirmed the Order of the Appellate Division (Pet. 26a).

Argument

It was well settled constitutional law as early as 1919 that a state may in the exercise of its police powers fix reasonable rates for public services provided by utility companies and common carriers, without unconstitutionally impairing the validity of contracts, even though the rate thus fixed would be higher than and supersede a contract

rate. *Union Dry Goods Company* v. *Georgia Public Service Corporation*, 248 U.S. 372 (1919).

Metropolitan Transportation Authority is the arm of the state which is empowered to regulate the fares of the LIRR, having succeeded to the powers of the New York Public Service Commission (hereinafter PSC) in regard to regulation of LIRR fares (R. 157).[2]

Petitioner argues (Pet. 12) that the legislature had not intended to vest MTA with the same rate making powers as PSC had with respect to LIRR (i.e., the power to set rates for LIRR which would supersede LIRR's contract rates), but this question has been resolved against him in the state courts, and thus presents no federal question, since this Court must accept the decision of the highest court of the state fixing the meaning of the legislation as though such meaning had been specifically expressed therein. *Knights of Pythias* v. *Meyer*, 265 U.S. 30, 32 (1924). Of course, the constitutionality of the statute as construed and applied is the question before this Court. Petitioner raises the single constitutional issue of violation of the Contract Clause of the United States Constitution (Pet. 3).

Petitioner does not argue that MTA acted unreasonably in raising LIRR's fares. Rather, petitioner's sole constitutional argument is that since LIRR is a wholly-owned subsidiary of MTA, the act of MTA in cutting short the life of ten-trip tickets[3] (thus preventing persons such as

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[2] The history of the creation of MTA and the scope of its powers over LIRR are outlined in the case of *Long Island Rail Road Co.* v. *Public Service Commission*, 30 AD 2d 409, 413-414, 292 NYS 2d 167, 171-173, aff. 23 NY 2d 852, 298 NYS 2d 65. See also the annotation, McKinney's Consolidated Laws of New York Annotated, Book 42, Public Authorities Law, § 1260; and see also §§ 1264 and 1266, subdivisions 3 and 8.

[3] Pro-rata refunds based on the unused portion of the tickets were required to be made and in actuality have been made to all those requesting them.

petitioner who had purchased these tickets in anticipation of a fare increase from continuing to avail themselves of a lower rate) amounted to the state abrogating its own contract in violation of the Contract Clause of the United States Constitution. Thus, it is petitioner's position that while the state may, in the proper exercise of its police power raise rates and thus impair contracts entered into between individuals and a private public service company, the state may not constitutionally alter rates in such a manner as to impair contracts between individuals and a wholly-owned subsidiary railroad corporation of the state's regulatory arm.

Assuming, *arguendo,* that despite the separate corporate status of LIRR, this Court were to find that the act of MTA did indeed amount to the state altering its own obligation, it does not follow that such alteration is unconstitutional. This Court held in *City of El Paso* v. *Simmons,* 379 U.S. 497 (1965), that in the proper exercise of the reserved power of a state to safeguard the vital interests of its people, a state may modify its own obligation.[4] Further, this Court in *City of El Paso* v. *Simmons, supra,* relied on cases which involved the modification of private contracts in the exercise of the police power of the state. Accordingly, one is led to the conclusion that the test of what is a valid modification of an obligation in the exercise of the police power is the same whether the state is modifying its own obligation or that of private parties.

It is clear from the line of cases represented by *Union Dry Goods Co.* v. *Georgia Public Service Corporation, supra,* that the regulation of the charges made by common carriers is an area in which the states have historically exercised the police power to safeguard the vital interests of the people, and in so doing have modified contracts with-

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[4] See also *Beer Co.* v. *Massachusetts,* 97 U.S. 25 (1877); *Stone* v. *Mississippi,* 101 U.S. 814 (1879); and *Atlantic Coast Line R.R. Co.* v. *Goldsboro,* 232 U.S. 548 (1913).

out violation of the Contract Clause. Thus, in view of *City of El Paso* v. *Simmons, supra,* it is clear that this valid exercise of the police power does not suddenly become invalid because an obligation of a wholly-owned subsidiary of the state regulatory agency is affected as opposed to a wholly private obligation.

None of the cases relied upon by petitioner sustain his position. None has anything to do with the exercise of the power to regulate rates for public services. *Fletcher* v. *Peck,* 6 Cranch 87 (1810), involved the attempt of the Georgia legislature of 1796 to annul a land grant made by the legislature in 1795. There were charges of bribery as regarded the original grant, but the original grantees had sold the property to innocent purchasers, of whom Fletcher was one, prior to the 1796 law, which was held invalid.

Sinking Fund Cases, 99 U.S. 700 (1878); *Lynch* v. *United States,* 292 U.S. 571 (1934); and *Perry* v. *United States,* 294 U.S. 330 (1935), dealt not with the Contract Clause, which applies only to state legislation, but with the similar restriction placed on the Congressional power to impair contracts by the Due Process Clause. In the *Sinking Fund Cases, supra,* the government had issued to the Union Pacific Railroad Co. bonds to finance construction of the railroad. By the terms of the loan, the company, *inter alia,* was obligated not only to pay both principal and interest with respect to the bonds at maturity but also to furnish transportation and other services to the government at reasonable rates and to apply to the payment of the bonds and interest half the compensation due to the company from the government as it was earned. Further, after completion of the railroad, it was to apply 5 per cent of its net annual earnings to the payment of the bonds. More than ten years after the issuance of the bulk of the bonds, Congress in an act of 1878 required that the government retain the whole amount of compensation due to the company as compensation for services rendered to the govern-

ment; and that the one half of the compensation withheld and not applied in liquidation of interest was to be deposited in a sinking fund established in the United States Treasury. The company was also required to pay into the fund 25 per cent of its net annual earnings. The fund was to be invested in U. S. bonds and applied to the satisfaction of the bonds loaned to the company at their maturity and of all interest paid by the government. This Court upheld the act of Congress on the grounds that it was warranted under the right of amendment reserved in the company's charter, stating at 99 U.S. 719 that it was unnecessary to decide what power Congress would have had over the charter if the right of amendment had not been reserved. However, in the course of its opinion, the Court did state with respect to the powers of Congress aside from the right retained to amend the charter:

> Not to pursue this branch of the inquiry any further, it is sufficient now to say that we think the legislation complained of may be sustained on the ground that it is a reasonable regulation of the administration of the affairs of the corporation, and promotive of the interests of the public and the corporators. *Sinking Fund Cases, supra,* at 726.

If anything, *Sinking Fund Cases, supra,* point in a direction opposite of petitioner's position, having upheld the government's action despite the dicta quoted by petitioner (Pet. 8).

Perry v. *United States, supra,* involved an attempt by Congress to invalidate by direct legislation the "gold clause" contained in certain government obligations. While the opinion of the Court found the direct invalidation unconstitutional, it went on to non-suit the plaintiff on the grounds that Congress had constitutionally made legislative changes in the currency and restricted possession and dealing in gold, so that even if plaintiff were paid in accordance with the gold clause, there was no showing that he would have been better off than being paid the face value

of the bond in the new currency. Accordingly, the opinion of the Court was that plaintiff failed to show any damages. It should be noted that in his concurring opinion, Justice Stone, the fifth Justice needed to make up the majority, expressly refused to join in the dicta quoted by petitioner (Pet. 8).

In *Lynch* v. *United States*, 292 US 571 (1933), the Court held that Congress could not cancel government war risk life insurance. However, in that case Justice Brandeis was careful to point out that the Due Process restriction against impairment of federal government obligations is not absolute, stating at pages 579-580:

> That the contracts of war risk insurance were valid when made is not questioned. As Congress had the power to authorize the Bureau of War Risk Insurance to issue them, the due process clause prohibits the United States from annulling them, unless, indeed, the action taken falls within the federal police power or some other paramount power. (Footnote omitted)
>
> The Solicitor General does not suggest, either in brief or argument, that there were supervening conditions which authorized Congress to abrogate these contracts in the exercise of the police or any other power.

An example of a retroactive change in United States obligations undertaken "within the federal police power or some other paramount power" is found in *Lichter* v. *United States*, 334 U.S. 742 (1948), which sustained the power of Congress in the exercise of the war power to pass legislation which authorized the renegotiation and capture of excess profits on government contracts and subcontracts entered into prior to the enactment of the Renegotiation Act.

There is yet another reason why an impairment problem is not conceivable in the action taken by MTA. Unlike

the action of the state in *City of El Paso* v. *Simmons*, *supra*, or the action of Congress in *Licter* v. *United States*, *supra*, the action of MTA was taken pursuant to a statute enacted prior to the sale of the ten-trip tickets in question. As was pointed out by Judge Cardozo, then of the New York Court of Appeals, in the case of *People ex rel. City of New York* v. *Nixon*, 229 N.Y. 356, 361 (1920):

> The obligation of a contract is determined by the law in force when it is made (*McCracken* v. *Hayward*, 2 How. (U.S.) 608, 612). There are times when, in the exercise of the police power, an obligation, once attaching, may be modified or destroyed (*Louisville & Nash. R.R. Co.* v. *Mottley, supra; Union Dry Goods Co.* v. *Georgia Pub. Serv. Corp., supra; Producers' Transp. Co.* v. *R.R. Comm., supra*). That problem never arises when the power has been exerted before the contract has been made. Impairment is conceivable as the result of a statute passed thereafter. Impairment is inconceivable when, at the time of the contract, the statute is in force (*Lehigh Water Co.* v. *Easton*, 121 U.S. 388; *Denny* v. *Bennett*, 128 U.S. 489; *Oshkosh Water Works Co.* v. *Oshkosh*, 187 U.S. 437, 446). Statutes then existing are read into the contract. They enter by implication into its terms. They do not change the obligation. They make it what it is. The statute which clothed the commission with jurisdiction to increase charges if found to be inadequate, was notice to municipalities that franchises thereafter granted must be coupled with no conditions inconsistent with the jurisdiction thus conferred. The commission is now holding the city to terms which were accepted by implication when the conditions were imposed. This is not to "transform a consent that was qualified into one that is absolute" (*Matter of Int. Ry. Co., supra*, p. 482) as the result of retroactive legislation. This is merely to give effect to the settled rule that contracts are made in submission to existing legislation.

Judge Cardozo made the foregoing statement in the course of deciding that, notwithstanding the fact that a railroad had obtained the consent of the City to operate in a street upon the condition that five cents should be the maximum fare, the Public Service Commission could nevertheless authorize a higher fare pursuant to its authority to set fares under the Public Service Law. While the statement was made with respect to the New York State Constitution's prohibition on impairment of the obligation of contracts, it is, from the authorities cited, an application of federal constitutional law to that question.[5]

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[5] It should be noted that the power of the Public Service Commission to set rates for railroads was not contained in Section 66(5) of the Public Service Law as is suggested on page 13 of the petition but under Section 49 of that law. Section 66(5) relates to gas and electric corporations only.

The statute Judge Cardozo spoke of in *Nixon* was a predecessor of Section 49, specifically L. 1911, Chap. 546, and allowed the Public Service Commission to change fares of railroads "notwithstanding that a higher rate, fare or charge has heretofore been authorized by general or special statute." No mention was made of the power to change rates in contravention of contracts entered into prior to the statute. Nonetheless, Judge Cardozo stated with regard to the statute at 229 N.Y. 359:

> The question soon arose whether the new rule was retroactive and annulled existing contracts in conflict with its terms. Indisputably it annulled such contracts between carriers and passengers, or carriers and shippers (*Louisville & Nashville R.R.* v. *Motley*, 219 U.S. 467; *People ex rel. N.Y. Steam Co.* v. *Straus, supra; Postal Tel.-Cable Co.* v. *Associated Press, supra; Producers' Transp. Co.* v. *R.R. Comm., California*, 251 U.S. 228).

The undecided question under state law was whether the legislature intended to clothe PSC with the power to alter existing contracts between railroads and municipalities when the contracts established rates as conditions of a franchise. Judge Cardozo pointed out at 229 NY 359-360:

> Restraint under the Federal Constitution, there certainly was none (*City of Worcester* v. *Worcester Con. St. Ry. Co.*, 196 U.S. 539, 548; *Hunter* v. *City of Pittsburgh*, 207 U.S. 161, 178; *Union Dry Goods Co.* v. *Georgia Pub. Service Corp.*,

(*footnote continued on following page*)

Accordingly, the action of MTA in setting fares for LIRR which had the effect of releasing LIRR from its contractual obligation under the ten-trip tickets was of a type which has historically and constitutionally been taken by state regulatory agencies and raises no possible question with respect to violation of the Contract Clause of the United States Constitution.[6]

The courts of New York have not, as petitioner suggests, radically changed the law of New York with respect to the impairment of the obligation of contracts[7] or violated the Federal Constitution by opening the door to any state agency to repudiate its contracts. No one could seriously contend that on the basis of the state court decisions MTA could properly order LIRR to repudiate whichever contracts it found undesirable.

Petitioner fails to realize that the contract arising from the ten-trip ticket falls into that special category of contracts regarding public service which are inherently sub-

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(footnote continued from preceding page)

supra; Postal-Tel. Cable Co. v. *Associated Press, supra; City of Englewood* v. *Denver & So. P. Ry. Co.*, 248 U.S. 294; *New Orleans* v. *New Orleans Water Works Co.*, 142 U.S. 79; *People ex rel. Vil. of South Glens Falls* v. *P.S. Comm., supra*)."

He then went on to dispose of the question of restraint under the State Constitution prohibition against impairing the obligation of contracts on the grounds that impairment is inconceivable when the statute pursuant to which the impairment is made is in existence at the time the contract is made.

[6] None of the thirteen state court judges who ruled on the case at bar found any Federal Constitutional problem. The single lower court judge who ruled in favor of petitioner did so on the basis of an interpretation of state law which was unanimously rejected by the five justices of the Appellate Division and the seven judges of the Court of Appeals.

[7] *McMaster* v. *State of New York*, 108 N. Y. 542, cited by petitioner involved no asserted exercise of police power, but the breach of a contract for the supply of sand stone for the construction of certain buildings.

ject to regulation and impairment in the exercise of the police power, since regulation of the rates to be charged for various public services including railroad service have time and again been found to be in the vital public interest and therefore a valid exercise of the police power. So long as the rates set are reasonable (petitioner does not contest their reasonableness), there can be no Federal Constitutional issue. *Union Dry Goods Co.* v. *Georgia Public Service Corporation, supra.*

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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